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ALEXANDER L. STEVAS,
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No. 80-1688

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAMARR BADONI, *et al.*,

Petitioners,

v.

R. KEITH HIGGINSON, *et al.*,

Respondents.

and

STATE OF UTAH, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF THE STATE OF UTAH, THE CENTRAL UTAH WATER CONSERVANCY DISTRICT, THE STATE OF COLORADO, THE COLORADO RIVER WATER CONSERVATION DISTRICT, AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT

INTRODUCTION AND SUMMARY OF RESPONDENTS-INTERVENORS' POSITION

Petitioners seek a Writ of Certiorari from this Court to review the Decision of the United States Court of Appeals for the Tenth Circuit in this case, wherein a unanimous Court rejected Petitioners' claims for relief, which claims were predicated upon the exercise of their

religious beliefs under the First Amendment to the United States Constitution.

Respondents-Intervenors were concerned when this litigation was initiated because the claims asserted by Petitioners threatened to substantially interfere with the operation of Lake Powell and the development of water in the Upper Colorado River Basin. To protect their interests, Respondents-Intervenors petitioned the Court to permit intervention. However, as is pointed out in the following section of this Brief, it now appears that the threat to the interests of Respondents-Intervenors may be moot because the relief Petitioners now appear to be seeking is limited to matters other than restricting the operation of Lake Powell. However, unless and until this issue is formally removed from this action, Respondents-Intervenors must continue to oppose Petitioners' claims. Even though the focus of this Brief will be directed primarily toward those aspects of the Decision of the lower court which relate to the operation of Lake Powell, Respondents-Intervenors desire to make it clear that they do not believe Petitioners have presented a basis for certiorari on any facet of the lower court's Decision.

Respondents-Intervenors generally concur with Petitioners' statements with respect to jurisdiction, parties, and the constitutional provisions involved, but disagree that this is an appropriate case for certiorari.

The real question in this case is whether, based upon the specific facts and evidence presented to the

trial court, Petitioners have a cognizable claim for relief under the First Amendment to the United States Constitution. Respondents-Intervenors contend that under the facts of this case and the clear pronouncements of this Court, Petitioners' claim must fail. The narrow question presented in this action does not raise the broad spectrum of issues which both Petitioners and *Amici Curiae* have suggested in an effort to capture the concern and sympathy of this Court. With respect to the Brief proposed by *Amici Curiae,* Respondents-Intervenors oppose the appearance of *Amici Curiae* in this action and believe that the range of matters which they seek to advance here are improper in this action and are not necessitated by the ruling of the lower court.

This Brief is submitted jointly by the State of Utah, the Central Utah Water Conservancy District, the State of Colorado, the Colorado River Water Conservation District and the Southwestern Water Conservation District, all of whom were Defendants-in-Intervention before the trial court and are referred to herein as Respondents-Intervenors.

THE INTERESTS OF RESPONDENTS-INTERVENORS MAY BE MOOT

As noted above, it now appears that Petitioners have limited the relief they are seeking to matters other than restricting storage or the manner of operation of Lake Powell. If this had been done in the original Complaint, Respondents-Intervenors would not have sought intervention. The method of operation of Rainbow Bridge National Monument is of no direct concern

to these Respondents-Intervenors so long as their rights under the Colorado River Compact, the Upper Colorado River Basin Compact, and legislation providing for the development of water projects on the Colorado River System are not impaired.

Petitioners' Complaint alleged three separate causes of action. The First Cause of Action alleged that Petitioners' right to religious freedom under the First Amendment and their right to be secure in their property under the Fifth Amendment were being violated by the encroachment of the waters of Lake Powell into the Rainbow Bridge National Monument and by visits of tourists and other non-Indians to Rainbow Bridge.

The Second Cause of Action alleged that Section 1 of the Colorado River Storage Project Act (43 U.S.C. §620) was designed to protect the religious beliefs of Petitioners and their interest in Rainbow Bridge by requiring that adequate protective measures be taken to prevent the waters of Lake Powell from entering Rainbow Bridge National Monument.

The Third Cause of Action alleged that the operating criteria for Glen Canyon Dam and Lake Powell must be subjected to an environmental impact study and statement under the mandate of Section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. §4332(2)(C)).

At page 13, footnote 6 of their Petition for Writ of Certiorari, Petitioners state that their Second and Third

Causes of Action have either been abandoned or become moot, and they seem to have restricted their claim under the First Cause of Action to a request that the Federal Government merely operate Rainbow Bridge National Monument in such a way as to reduce or minimize conflicts between visitors to the Monument and the exercise by Petitioners of certain religious practices.

To illustrate, Petitioners go to great lengths in discussing the course of this litigation to focus the Court's attention on relief other than the lowering of Lake Powell, and are critical of both Respondents and the lower court for what they believe is undue emphasis on this issue (Petition, pp. 14-16). Petitioners then proceed to emphasize that they are seeking lesser measures than that of lowering Lake Powell. For example, at pages 19-20, Petitioners state:

> Petitioners had suggested that various measures involving limitations on tourist activity at the Monument—all of which measures fell far short of lowering the level of Lake Powell—could and should be considered. Among the measures mentioned in the pre-trial order in the District Court and in Petitioners' brief in the Court of Appeals were occasionally closing the Monument to allow ceremonies to be held, prohibiting the use of alcohol and other sacrilegious activity, moving the floating marina, and more strictly limiting tourist visitation.

Further, Petitioners correctly state, with seeming acquiescence, that both the District Court and the Court of Appeals firmly rejected the lowering of Lake Powell as a form of relief (Petition, footnote 11, p. 19).

Petitioners subsequently state, at page 23 that:

> In the instant case, no otherwise unlawful *or even extraordinary steps are sought.* . . . (Emphasis added).

Obviously, the lowering of Lake Powell would be an extraordinary step with disastrous consequences to the rights of Respondents-Intervenors to develop the waters of the Colorado River. Finally, in the Conclusion of their Petition, Petitioners urge that less drastic remedies would be adequate to provide the relief which they seek:

> There are remedies available both modest and feasible that would substantially lessen the burdens on Petitioners' religion. (Petition, p. 38).

Measures such as those now requested by Petitioners, if adopted by the Federal Respondents, probably would violate the Establishment Clause of the First Amendment, but would not in any way threaten the operation of Lake Powell or Glen Canyon Dam, or the operating criteria for the facility, and would appear in no way to threaten the interests of Respondents-Intervenors in their development and use of the waters of the Colorado River.

Therefore, the interests which Respondents-Intervenors sought to protect by intervention in this action appear to no longer be threatened, so long as Petitioners' claims are confined to the relief requested in their Petition for Writ of Certiorari. However, Respondents-Intervenors believe that even the modified claims of Peti-

tioners are not cognizable in a court of law and that the judgment of the lower court was in all respects correct.

SUPPLEMENTAL STATEMENT OF THE CASE

The following facts were conceded in the lower court and are not controverted in this proceeding. On May 30, 1910, President William H. Taft created the Rainbow Bridge National Monument by proclamation in accordance with authority conferred upon him by the Act of June 8, 1906, 16 U.S.C. §431. The Monument contains 160 acres, on which is situated Rainbow Bridge, believed to be the world's largest natural bridge.

The Bridge is a sandstone arch 309 feet high, with the arch columns situated on either side of Bridge Creek, for a total span of 278 feet. The Monument is located in Bridge Canyon, a side canyon south of and tributary to the main stem of the Colorado River.

The 160-acre Monument has never been a part of the Navajo Reservation. The original Navajo Reservation was created in 1868 by Treaty (15 Stat. 667), but encompassed only land areas located in Arizona. Twenty years later, an area in Utah adjacent to the Reservation and commonly known as the Paiute Strip was "withheld from sale and settlement and set apart as a reservation for Indian purposes" by Executive Order of May 17, 1884. Then, eight years later, the Paiute Strip was believed to have mineral potential and was restored to the public domain by Executive Order of November 19, 1892.

This "yo-yo" program continued, with the Paiute Strip alternately being reserved for Indian use and then being restored to the public domain, until March 1, 1933, when it became part of the Navajo Reservation (47 Stat. 418). However, from and after creation of the Rainbow Bridge National Monument in 1910, none of the reservations or restorations purported to affect the Monument, and since its creation it has always been held in federal ownership as a National Monument. It is part of the National Park System administered by the National Park Service.

Glen Canyon Dam, authorized in 1956 by P.L. 84-485 (43 U.S.C. §620, *et seq.*), is 710 feet in height and is located about fifty-eight miles downstream from Rainbow Bridge on the main stem of the Colorado River. It is a fundamental feature of the Colorado River Storage Project, and is designed to serve multiple-purpose functions, including irrigation, recreation, river regulation, municipal and industrial uses, and generation of hydroelectric power.

Glen Canyon Dam impounds water in Lake Powell, which has a total storage capacity of 27,000,000 acre-feet. The elevation of the Reservoir at full capacity is 3,700 feet above mean sea level. The lowest elevation of the 160-acre tract constituting the Rainbow Bridge National Monument (upstream fifty-eight miles from the Dam), is 3,606 feet above mean sea level. Approximately one-half of the total storage capacity of the Reservoir is between the elevations of 3,600 and 3,700 feet. Thus, nearly one-half of the total storage capacity

of the Reservoir is dependent upon utilizing the storage space located above the lower boundary of the Monument (the area between elevations 3,606 and 3,700).

Obviously, it was necessary either to (1) build some protective device to prevent the water from entering the Monument as the Reservoir filled to an elevation of 3,700 feet above mean sea level, or (2) allow the rising level of the Reservoir to invade the Monument area. Congress originally selected the first alternative by providing in Section 1 of the Colorado River Storage Project Act (43 U.S.C. §620) that:

> . . . the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument.

Thereafter, Congress changed its mind, and selected the second alternative of allowing water to enter the 160-acre tract constituting the Monument, as was clearly decided in *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert denied* 94 S.Ct. 933 (Jan. 21, 1974). However, as the court pointed out in that action, even when Lake Powell is filled to its designed capacity, the water within the monument is confined to the channel of Bridge Creek beneath Rainbow Bridge:

> . . . When the water level of Lake Powell reaches the level of 3,700 feet above sea level, which is the maximum design capacity for Glen Canyon Dam, the reservoir water will be standing in the inner gorge of the creek under the Rainbow Bridge Arch. At this level the water will there have a depth of about forty-eight feet, but will

> not rise enough to get out of the gorge or to reach the base of the Rainbow Bridge Arch since this point is some twenty-five feet above that level. The water, however, would then be well within the boundaries of the Monument although confined in the inner gorge of the creek. (485 F.2d at 3).

At this juncture some brief explanation is in order with respect to Navajo lands that were acquired by the Federal Government for Glen Canyon Dam and Lake Powell. Even though Rainbow Bridge National Monument is not and has never been part of the Navajo Reservation, the "Paiute Strip" was made part of the Reservation in 1933. This Strip included areas that would be inundated by Lake Powell, and there were also areas in Arizona that were part of the Reservation which were needed for the Reservoir and related facilities. Accordingly, Congress took steps to acquire two categories of land that were part of the Navajo Reservation in exchange for other lands. Parcel A was that part of the Reservation which included and surrounded the "federal" community of Page, Arizona, located at the Dam site, and Parcel B extended upstream from Parcel A so as to include all Reservation lands located below the elevation of 3,720 feet above mean sea level, terminating at the San Juan River. This elevation was 20 feet higher than the maximum designed elevation of the Reservoir (see P.L. 85-868, 72 Stat. 1686).

Thus, it was only logical that some agreement be negotiated with the Navajo Tribe with respect to the development of lands adjacent to the Reservoir. Such a Memorandum of Agreement was entered into in 1970

between the National Park Service, the Bureau of Reclamation, the Bureau of Indian Affairs, and the Navajo Tribe (a copy of this Agreement is attached to the Answer of the Federal Defendants). That Agreement generally concerned development of the Glen Canyon National Recreation Area and adjacent tribal lands, and it specifically provided for the location of the Rainbow Bridge Marina (see paragraphs 23 and 24 of said Agreement). However, nothing was said in that Agreement about any religious significance which Rainbow Bridge might have had to the Navajo Tribe or to individual members of the Tribe. To the contrary, it is clear that the Agreement contemplated development of tourist facilities to accommodate visitors to Rainbow Bridge.

With respect to regulatory controls for operating Lake Powell and Glen Canyon Dam, it is important to note that these controls are part of the criteria for the "Coordinated Long-Range Operation of Colorado River Reservoirs". The criteria primarily relating to water releases from, and water levels in, Lake Powell were promulgated under the congressional direction contained in P.L. 90-537, 82 Stat. 900, 43 U.S.C. §1552. The statute required releases in accordance with specific conditions, taking into account the Colorado River Compact (46 Stat. 3000), the Upper Colorado River Basin Compact (63 Stat. 31), and the Mexican Water Treaty (59 Stat. 1219). The important observation is that these criteria clearly and explicitly control the operation of Lake Powell and the water levels impounded therein, and the Secretary of Interior has no authority or dis-

cretion to act in any way contrary to the congressional guidelines.

ARGUMENT: THERE HAS BEEN NO INTERFERENCE WITH THE CONSTITUTIONAL RIGHTS OF PETITIONERS

Petitioners argue that their right to religious freedom under the First Amendment is being violated by the encroachment of reservoir waters into the Monument area and visits by tourists and non-Indians to Rainbow Bridge. This claim is not based on any cognizable legal theory upon which relief can be granted, as will be shown below.

A. *There has been no Interference with Religious Beliefs*

It will be assumed, *arguendo*, that Rainbow Bridge is a sacred religious shrine to Petitioners, although it seems clear that the Navajo Tribe as a whole perceived no such religious significance when it entered into the Agreement with federal agencies for the development of tourist facilities to serve the Monument area (see Agreement attached to the Answer of Federal Defendants).

Under the First Amendment to the United States Constitution it is unlawful for Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof. But there has been no violation of that protection in this case. Unquestionably, Petitioners are entitled to embrace any religious views

they wish; but they have not alleged that they have been persecuted or prosecuted under any act of Congress because of their religious beliefs. They simply have alleged that their religious perception of Rainbow Bridge is affronted when the Reservoir is operated according to the operating criteria and when the Monument is used as a National Monument (*i.e.*, non-Indians are encouraged and allowed to visit the Monument). In fact, Petitioners have not even alleged that they have been preventd from conducting religious practices within the Monument.

There is no authority to support Petitioners' argument. While the freedom to embrace a religious belief is absolute, the freedom to take action in accordance with that belief is not (*Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Gillette v. U.S.*, 401 U.S. 437 (1971); *Johnson v. Robinson*, 415 U.S. 361 (1974); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Reynolds v. U.S.*, 98 U.S. 145 (1878); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcase v. Watkins*, 367 U.S. 488 (1961); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Loewing v. U.S.*, 392 F.2d 219 (10th Cir. 1968); *U.S. v. Cleveland*, 56 F. Supp. 890 (D. Utah, 1944), *aff'd.* 146 F.2d 730 (10th Cir. 1945); *U.S. Ex rel Goings v. Aaron*, 350 F.Supp. 1 (D. Minn. 1972); and *Gospel Army v. City of Los Angeles*, 163 P.2d 704 (Cal. 1945), *appeal denied* 331 U.S. 534).

Petitioners assert that this case involves a situation

which reflects impairment, hostility and oppression of their religious beliefs (Petition, pp. 18-19, 26-27). This simply is not so. Petitioners have not and cannot point to any facts or evidence to support such a claim. Petitioners have not been denied access to Rainbow Bridge National Monument, nor is this a situation where a group has sought to use public property for a particular event and been refused. Petitioners' claim is much broader than that. Petitioners argue that Lake Powell and the Rainbow Bridge National Monument should be managed in perpetuity in such a manner as to accommodate and further Petitioners' religious beliefs. While Petitioners have modified their claims for relief as this litigation has evolved, they are still seeking a recognition that property which they do not own or control be administered as a religious shrine for their benefit. In other words, Petitioners are seeking special and unique treatment in the furtherance of their religious beliefs at the expense of the rights of other parties to this litigation, in derogation of public access and availability to this National Monument, and also in direct opposition to various acts of Congress which mandate the continued management of this property as has been done in the past. Petitioners cannot obtain the broad sweep of relief they seek under the facts of this case under the First Amendment to the Constitution of the United States or the American Indian Religious Freedom Act (42 U.S.C. §1996). The cases relied upon by Petitioners simply are not analogous to this situation, and the Decision of the lower court is sound that, based upon the facts of this case, the relief sought by Petitioners would violate the Establishment Clause of the First

Amendment (*Stuttlesworth v. Birmingham*, 394 U.S. 149 (1969); *Abington School District v. Schempp, supra;* and *Cox v. Louisiana*, 379 U.S. 536 (1965)).

B. *The Lower Court's Ruling on Lake Powell is Correct*

With respect to that portion of the lower court's Decision dealing with the operation of Lake Powell, the lower court clearly reached the proper result. The unencumbered operation of Lake Powell is critical to water use and development in the Colorado River Basin, and the rights of Respondents-Intervenors in the Colorado River would be significantly and substantially impaired if Lake Powell is not operated as a storage reservoir to carry out its designed purposes. It would serve no useful purpose to review the background, need for and purpose of the Lake Powell Project in great detail, since Petitioners do not challenge this facet of the lower court's Decision nor offer any reason why certiorari should be granted with respect to it. However, they argue that the lower court's Decision should be reversed and the case sent back to the trial court for a factual determination of what alternative relief would be appropriate. But the court would not reach such a question in light of its conclusion that Petitioners were entitled to no relief.

Both the trial court and the court below acknowledged the sincerity of the belief and appropriately viewed the scope of the religious interest in balancing that interest against conflicting state interests, concluding on

the basis of all of Petitioners' statements given in depositions, interrogatories, pleadings and affidavits that the Petitioners' interest was limited to a few medicine men and involved only isolated ceremonies since 1965. Petitioners do not contest the conclusion of the lower court that Respondents' interests in the operation of the Dam and Reservoir in the manner described by statute and regulation was substantial and outweighed the relatively weak showing made by Petitioners. Further, it must be recognized that the lower court reviewed Petitioners' claims and the facts in a light most favorable to Petitioners:

> In reviewing a summary judgment, we view the facts and reasonable inferences drawn therefrom in the light most favorable to plaintiffs. The pertinent facts in this case are as follows. Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of central importance in the religion of some Navajo people living in that area for at least 100 years. These shrines are regarded as the incarnate forms of Navajo gods, which provide protection and rain-giving functions. For generations Navajo singers have performed ceremonies near the Bridge and water from the spring has been used for other ceremonies. Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease. Because of the operation of the Dam and Lake Powell, the springs and prayer spot are under water. Tourists visiting the sacred area have desecrated it by noise, litter and defacement of the Bridge itself. Because of the flooding and the presence of tourists, plaintiffs no longer hold

ceremonies in the area of the Bridge. (Opinion of the Court of Appeals).

The lower court then properly concluded that under the balancing of interests tests set forth in *Wisconsin v. Yoder, supra,* Petitioners could not prevail on their First Amendment claim:

> With respect to the government action of impounding water in Lake Powell the stated infringement is the drowning of the Navajo gods, the increased tourist presence attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water. We agree with the trial court that the government's interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs' religious interest. This Court has previously considered the importance of the Glen Canyon Dam and Reservoir as a crucial part of a multistate water storage and power generation project. *See* Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied,* 414 U.S. 1171 (1974). In the instant case unrebutted evidence, by affidavit, shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico, Utah and Wyoming from the Colorado River.
>
> Such a reduction of use in each of the above Upper Colorado River Basin States would among other things limit and reduce the development of water supplies within these States on either a long-term basis for irrigation purposes, for development of mineral

> and other natural resources, and for municipal and industrial water supplies.
>
> Aff. of David L. Crandall, Regional Director of the Upper Colorado Region of the Bureau of Reclamation. Moreover, it is reasonable to conclude that no action other than reducing the water level would avoid the alleged infringement of plaintiffs' beliefs and practices. In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements. (Opinion of the Court of Appeals).

It is difficult to see how the lower court could have reached any other result under the facts of this case. Petitioners apparently do not challenge this conclusion, since they advance no argument remotely suggesting that the lower court was in error in reaching this result. The plain fact is that there is simply no justifiable basis for this Court to grant Petitioners any relief which would affect the operation of Lake Powell.

CONCLUSION

It is respectfully submitted that the Decision of the lower court regarding Petitioners' First Amendment claims is correct and proper in all respects, and Petitioners' Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, David L. Wilkinson, Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing **BRIEF OF THE STATE OF UTAH, THE CENTRAL UTAH WATER CONSERVANCY DISTRICT, THE STATE OF COLORADO, THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT, RESPONDENTS-INTERVENORS**, were served by mailing the same, first class postage prepaid, this 6th day of May, 1981, all in accordance with the Rules of this Court, upon each of the following:

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